

OFFICIAL FILE
ILLINOIS COMMERCE COMMISSION

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ORIGINAL

2005 MAR 24 A 11:07

Illinois Commerce Commission,

-vs-

Resource Technology Corporation,

Citation to show cause for continued QSWEF
Certification of Pontiac Facility and to
Investigate compliance with the final order in
Docket 97-0031 through 97-0045
Consolidated

)
)
) CHIEF CLERK'S OFFICE
) 02-0461
)
) Administrative Law
) Judge Hilliard
)
)
)
)
)

**TRUSTEE'S REPLY IN SUPPORT OF HIS MOTION
TO COMPEL AND MOTION TO STAY**

This dispute between Gregg E. Szilagyi, as Chapter 11 Trustee¹ ("Trustee") for Resource Technology Corporation, and the Staff of the Illinois Commerce Commission ("Staff") concerns the Trustee's request for drafts of Mr. Michael J. Carolan's testimony and correspondence between Mr. Carolan and Staff regarding revisions to Mr. Carolan's testimony ("Requested Discovery").² As Staff's testifying expert witness, Mr. Carolan is independent of and not employed by the ICC -- important facts that Staff ignores in its Response to Trustee's Motion to Compel ("Response"). As such, the Trustee is entitled to the Requested Discovery.

As a general rule, Illinois law requires full disclosure of relevant information. *See Ill. S. Ct. R. 201(b)*. As outlined in the Trustee's Motion, under Illinois law, discovery is to be "a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or

¹ On November 15, 1999, an involuntary bankruptcy case was filed against RTC. Subsequently, on February 1, 2000, a consensual Order For Relief And Order Converting The Bankruptcy Case To A Case Under Chapter 11 of the Bankruptcy Code became effective. On August 26, 2003, Gregg E. Szilagyi was appointed as the Chapter 11 Trustee for RTC.

² The Trustee's Motion to Compel and Motion to Stay also requested an additional sixty days for the Trustee to file his direct testimony. Staff does not object to continuing this date and the trial date for sixty days, subject to its being allowed additional time to file its rebuttal testimony.

a fair trial.” *Pemberton v. Tieman*, 117 Ill. App. 3d 502, 504, 453 N.E.2d 802, 804 (1st Dist. 1983). See also *Archer Daniels Midland Co. v. Koppers Co., Inc.*, 138 Ill. App. 3d 276, 278, 485 N.E.2d 1301, 1303 (1st Dist. 1985) (“The Illinois Courts maintain a broad discovery policy, looking to the ultimate ascertainment of truth.”). Discovery is liberal and intended to ensure that “each party knows as much about the controversy as is reasonably practicable.” *Mistler v. Mancini*, 111 Ill. App. 3d 228, 231, 443 N.E.2d 1125, 1128 (2nd Dist. 1983).

Staff’s attempt to manufacture exceptions to the general rule of broad discovery -- in the form of the attorney-client or work product privileges -- are unavailing. First, regarding the attorney-client privilege, the Requested Discovery consists, in part, of Mr. Carolan’s writings and Staff’s attorneys’ writings. Mr. Carolan, however is not Staff’s client and Staff are not Mr. Carolan’s attorneys. See Response at 4 (“Mr. Carolan provided Staff counsel along with certain other Staff members with a draft of his testimony in his role as the hired outside expert for Staff in this matter.”) As such, attorney-client communications are not implicated (because there are none). Indeed, the attorney-client privilege has no place in this discussion.

Second, regarding the work product privilege, Mr. Carolan is Staff’s testifying expert. Information concerning a testifying expert’s testimony and the bases therefore are discoverable. See, e.g., *Monier v. Chamberlain*, 35 Ill.2d 351, 360, 221 N.E.2d 410, 416 (1966) (material “containing relevant and material evidentiary details” even if made in preparation for trial, are discoverable); *People v. Spiezer*, 316 Ill. App. 3d 75, 86, 89, 735 N.E.2d 1017, 1025, 1027 (2nd Dist. 2000) (holding that testimony of nontestifying, consulting experts are protected from disclosure, following a case which held that the work product privilege is waived with respect to testifying experts). Here, Mr. Carolan relied upon the Requested Discovery in formulating his

final report. The Trustee is entitled to cross-examine Mr. Carolan about the Requested Discovery and also to review those documents.

Further, Staff fails to distinguish between testifying experts and consulting experts under Illinois and Federal case law.³ A testifying expert, such as Mr. Carolan, must disclose the types of information (e.g., draft reports) that comprise the Requested Discovery. *See United States v. Nobles*, 422 U.S. 225, 239-40 (1975) (“Respondent, by electing to present the investigator as a witness, waived the [work-product] privilege with respect to matters covered in his testimony. Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.”); *Barna v. United States*, 1997 WL 417847 (N.D. Ill. July 28, 1997, *2) (In a case dealing with the apparent conflict between privilege and full disclosure in connection with a testifying expert, the Court held “that any information considered by a testifying expert in forming his opinion on an issue, *even if that information contains attorney opinion work product*, is discoverable.” Emphasis supplied.); *SiLite, Inc. v. Creative Bath Products, Inc.*, 1993 WL 384562 (N.D. Ill. Sept. 28, 1993, *1) (in ordering production of an expert’s notes and drafts, among other things, the Court stated, “courts have held that when work product materials have been given to an adverse, testifying expert and may influence his or her testimony, such work product becomes discoverable[,]” and, citing the Advisory Committee Notes to Fed. R. Civ. P. 26, that “access to the discovery of the bases for an expert’s opinion is necessary in order for opposing counsel to effectively prepare for cross-examination and rebuttal of an expert’s testimony.”); *Mojica v. Doboy Packaging Machinery, The Nordson Corp.*, 1987

³ Like Ill. S. Ct. R. 223(f)(3), which requires disclosure and production of, among other things, the bases for expert witness’ opinions and any reports prepared by such witnesses, Fed. R. Civ. P. 26(a)(2)(B) requires disclosure and production of, among other things, the basis and reasons for the expert’s opinions.

WL 7813 (N.D. Ill. Mar. 12, 1987) (in ordering production of the testifying expert's complete file, including drafts and correspondence with counsel, the court held that the attorney-client and work-product privileges become seriously eroded when the expert is a testifying expert, as opposed to a non-testifying consultant, and that materials relied upon by the expert should be produced); *People v. Knuckles*, 165 Ill.2d 125, 139, 650 N.E.2d 974, 980 (1995) (privilege does not apply to testifying experts).

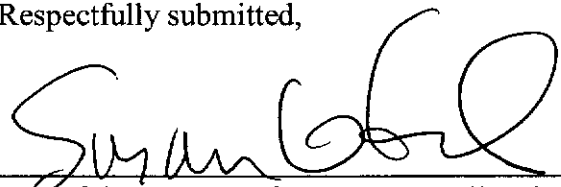
Given that Mr. Carolan relied upon the Requested Discovery in preparation and formulation of his opinions, final report and presentation of the final report, without access to those materials the Trustee will be prejudiced. Specifically, he will be precluded from knowing "as much about the controversy as is reasonably practicable" in derogation of Illinois' liberal discovery policy. Likewise, Staff will not have complied with the relevant provision of the Illinois Supreme Court Rules designed to allow the Trustee to properly prepare for cross-examination of Mr. Carolan.

CONCLUSION

For each of the foregoing reasons and those set forth in the Trustee's motion to compel, either independently or in combination, Gregg E. Szilagyi, as Trustee, urges that his motion to compel be granted.

March 23, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan G. Feibus", written over a horizontal line.

One of the attorneys for Gregg E. Szilagyi,
as Chapter 11 Trustee for Resource Technology
Corporation

Susan G. Feibus
Ross E. Kimbarovsky
Kathleen Holper Champagne
UNGARETTI & HARRIS LLP
3500 Three First National Plaza
Chicago, Illinois 60602
Telephone: (312) 977-4400
Facsimile: (312) 977-4405

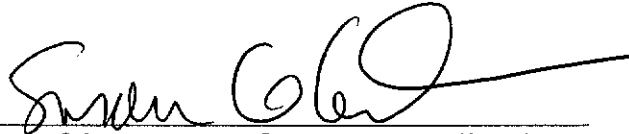
**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission,)	
)	
-vs-)	02-0461
)	
Resource Technology Corporation,)	Administrative Law
)	Judge Hilliard
Citation to show cause for continued QSWEF)	
Certification of Pontiac Facility and to)	
Investigate compliance with the final order in)	
Docket 97-0031 through 97-0045)	
Consolidated)	

NOTICE OF FILING

To: Attached Service List

PLEASE TAKE NOTICE that on Wednesday, March 23, 2005, we sent via federal express for filing with the Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, **Trustee's Reply in Support of His Motion To Compel And Motion To Stay**, a copy of which is hereby served upon you.

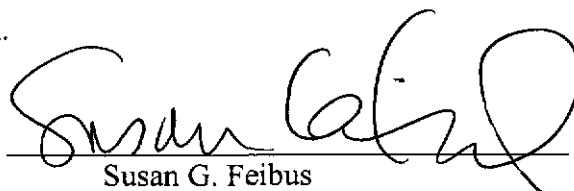


One of the Attorneys for Gregg E. Szilagyi, as
Chapter 11 Trustee for Resource Technology Corporation

Susan G. Feibus
Ross E. Kimbarovsky
Kathleen Holper Champagne
UNGARETTI & HARRIS LLP
3500 Three First National Plaza
Chicago, Illinois 60602
Phone: (312) 977-4400
Fax: (312) 977-4405

CERTIFICATE OF SERVICE

I, Susan G. Feibus, an attorney, hereby state that I caused true and correct copies of the foregoing **Notice of Filing** and **Trustee's Reply in Support of His Motion To Compel And Motion To Stay** to be served upon the Attached Service List by depositing same in a sealed envelope, postage prepaid, in the U.S. Mail at 3500 Three First National Plaza, Chicago, Illinois 60602, and via hand delivery upon John Feeley and Administrative Law Judge Hilliard, on March 23, 2005, before the hour of 5:00 p.m.


Susan G. Feibus

ICC Docket No. 02-0461

Energy Service List

JCF

Michael S Baird
Atty. for allied Waste Industries
Stotis & Baird Chartered
200 W. Jackson Blvd., Ste. 1050
Chicago IL 60606-6941

John Connolly
Resource Technology Corporation
330 S. Wells St., Ste. 711
Chicago IL 60606

Margaret Barnabee
Chairman's Assistant
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago IL 60601-3104

John Feeley
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago IL 60601

Michael Pabian
Assistant General Counsel
Exelon Business Services Company
10 South Dearborn, Floor 35
Chicago IL 60603

Betty Gallagher
Commonwealth Edison Company
227 W. Monroe, 9th Fl.
Chicago IL 60606

Paul F Hanzlik
Atty. for Commonwealth Edison Company
Foley & Lardner
321 N. Clark St., Ste. 1500
Chicago IL 60610

Ross E. Kimbarovsky
Kathleen H. Champagne
Attys. for the Trustee for Resource Technology
Corporation
Ungaretti & Harris
3500 Three First National Plaza
Chicago, IL 60602

Anastasia M Polek
Exelon Corporation
Legal Department - 35th Floor
10 S. Dearborn St.
Chicago IL 60603

Elizabeth D Sharp
330 S. Wells St., Ste. 711
Chicago IL 60606

David Borden
Illinois Commerce Commission
527 East Capitol Ave.
Springfield, IL 62701

Steve Knepler
Illinois Commerce Commission
527 East Capitol Ave.
Springfield, IL 62701

Thomas Griffin
Illinois Commerce Commission
160 North La Salle Street, Suite C-800
Chicago IL 60601-3104

Terrence Hilliard
Administrative Law Judge
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago IL 60601

Elizabeth A. Rolando
Chief Clerk
Illinois Commerce Commission
527 East Capitol Ave.
Springfield, IL 62701